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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD MENDOZA, Defendant and Appellant.	No. A151127 (San Francisco County Super. Ct. No. SCN 226734)

At its core, this appeal is about whether the trial court erred by excluding evidence defendant Richard Mendoza contends was critical to his mental state defense against the charge that he falsely imprisoned a woman, Chloe C., in a restroom located at San Francisco's One Embarcadero Center: a police officer's testimony describing Mendoza's out-of-court statement shortly after the incident and the testimony of an expert witness about a potentially delusion-causing condition Mendoza suffered from, hepatic encephalopathy. Mendoza argues this evidence showed he acted without criminal intent while under a delusion and that its exclusion, as well as the court's related refusal to instruct on the defenses of accident and mistake of fact, requires reversal of his false imprisonment conviction.

We conclude the court did not err in excluding the officer's testimony because it included inadmissible hearsay statements by Mendoza, the truth of which were critical to Mendoza's defense. The officer's proffered testimony was that Mendoza, when asked what had happened in the restroom, replied that "somebody told him his sister was in the restroom," that he went in the restroom looking for her, that he entered and asked the

victim if her name was Liz, that she responded affirmatively, that he climbed under the stall and saw it was not his sister and that he then left. Mendoza argues he offered this testimony for the nonhearsay purpose of showing he went to the restroom under a delusion that negated his intent to commit a crime. This argument belies that Mendoza offered his out-of-court statement for its truth regarding both why he acted (because he heard "somebody" tell him in his delusion his sister was in the restroom) and what he did in the restroom (he entered there looking for his sister, ascertained the woman there was not his sister, and left). Since Korte's testimony about Mendoza's statement was offered for its truth, it was hearsay regardless of the fact that it was offered to show Mendoza was in a delusional state of mind. And while Mendoza argues it fell within the then-existing-state-of-mind exception to the hearsay rule, admissibility under that exception rests on a determination of whether the hearsay was untrustworthy. We accord trial courts considerable deference in deciding that issue and conclude the trial court here did not abuse its discretion in finding Mendoza's out-ot-court statement was untrustworthy and, therefore, inadmissible.

Mendoza has forfeited his claim that the court erred in excluding his expert witness's testimony, and in any event he does not present a meaningful argument of error. Finally, the trial court did not commit instructional error because there was insufficient evidence to support instructions on accident and mistake of fact.

Finding no error, we affirm.

BACKGROUND

In a March 2017 first amended information, the San Francisco County District Attorney charged Mendoza with felony false imprisonment (Pen. Code, § 236)[1] and misdemeanor peeking (§ 647, subd. (j)(1)). A jury trial followed.

[1] All statutory references are to the Penal Code unless otherwise stated.

I.

Evidence Presented at Trial

Chloe C. testified that around 11:40 a.m. on November 2, 2016, she entered an unoccupied public women's restroom on the lobby level of One Embarcadero Center in San Francisco, where she worked. Anyone could enter the restroom. She went into the smaller of two stalls, closed the stall door, pulled down her pants and sat down on the stall's toilet seat.

As Chloe sat, Mendoza entered the restroom. He yelled and talked "really fast and in an aggressive tone" as he looked at her through a crack in the stall door and banged on the door. She could not understand him, screamed, told him to go away and took out her phone to call the police, but stopped calling when he said something like " 'don't do that' " or " 'put your phone down.' " She screamed again as Mendoza got down on the floor and reached into her stall. He then crawled into her stall, stood in front of her with his back to the stall door, grabbed her arm and pulled her down to the floor. She screamed again. He "lunged" towards her with one arm and she deflected his hand, fell back onto the toilet, crouched down in a ball and said, " 'Please don't hurt me.' "

Chloe testified that she then heard the bathroom door open, the sound of which was "really loud." Mendoza left the stall "[p]retty much immediately." He "turned around and unlocked the bathroom stall and exited the bathroom, and the door was open to the main bathroom, the main door was open, and then [a] lady came in." The incident lasted about two minutes.

A man testified that he was in One Embarcadero Center near the women's restroom when he heard a woman scream for help. Upon investigating, he saw Mendoza walk quickly away from the area of the restroom and Chloe emerge from the restroom looking "visibly upset, crying and shaking." The man followed in Mendoza's direction, found him about a block away standing on the corner, took a photograph of him and returned to Embarcadero Center, where he showed the photograph to Chloe, the police and building security.

San Francisco Police Officer Scott Korte responded to a call about the incident. He testified that a man showed him a photograph of Mendoza and indicated where he had gone. Korte found him on a street corner about a block away from One Embarcadero Center leaning against a light pole, detained and handcuffed him and asked him what had happened with the woman in the bathroom. Mendoza was responsive in a "calm and normal" manner and cooperated as police arranged a "cold show" with Chloe. Korte did not smell any alcohol on Mendoza's breath or observe any signs of intoxication. He arrested Mendoza and searched him. Mendoza had in his possession a bag that contained two unopened packets of protein powder, as well as an alcoholic beverage in an open can that took a while to empty out.

A clerk for the San Francisco Public Defender's Office testified that on January 30, 2017, he retrieved Mendoza's property from the sheriff's office. He looked at the items on March 15, 2017, and found among them four packets of protein powder and two packets of "an energy blend."

Dr. Judy Melinek testified for Mendoza as a medical expert on liver disease and liver failure. As we will further discuss, the trial court limited the jury's consideration of her testimony to the misdemeanor peeking charge. Melinek testified about a common complication of advanced cirrhosis of the liver known as "hepatic encephalopathy," in which the failing liver allows toxins like ammonia to enter the bloodstream and then the brain. Since the brain cannot dissipate ammonia, it "poisons the neurons" and can cause swelling of the brain and long-term damage to nerve cells, the latter being what is called chronic hepatic encephalopathy. There were four stages of hepatic encephalopathy. First, a person can experience "unawareness of one's environment, anxiety, depression," and other symptoms; next, there is "some disorientation," "[i]nappropriate behavior," and a decreased response to stimuli; then "it goes to stupor, confusion and bizarre behavior where the person clearly is not aware of their environment"; and finally, "the person is in a coma."

Melinek said "many factors" can increase the ammonia level in blood. These include dehydration and constipation, which can prevent the flushing of ammonia out the

body's system; gastrointestinal bleeding caused by cirrhosis, which increases the ammonia level because of the protein in blood; an infection, which can affect protein absorption; alcohol or depressant medications that can worsen sensitivity to ammonia; and consuming "more" meat and protein powders, which "can increase the likelihood of ammonia in your bloodstream." Someone with a lot of protein in their diet can have an elevated ammonia level and "can get delirious or confused. And then it can pass as the protein load goes down or they drink more water and get more hydrated." In their confusion, a person "can have hallucinations; you can hear things that other people don't hear like voices in your head. You can have visual hallucinations; you can see things that aren't there. You can have internal stimuli and you will think they're real. So you will hear a voice in your head and think somebody told you that."

Melinek testified that Mendoza's medical records indicated he previously had been diagnosed with hepatic encephalopathy, engaged in delusional behavior, experienced hallucinations, had abnormally high levels of ammonia in his blood and been given a medication, lactulose, used to treat hepatic encephalopathy. Based on her own physical examination of Mendoza in jail, during which she found that he had a "very fine flapping tremor" of his hands symptomatic of hepatic encephalopathy, Melinek opined that he suffered from "a very mild form" of chronic hepatic encephalopathy.

Melinek also noted that Mendoza's records indicated that at one time in 2016, he was advised "to go directly to eat a . . . protein rich meal," which she thought was inappropriate for hepatic encephalopathy. She also was "a little disturbed" by the lack of any referrals to liver specialists and any communication with him about the role that protein intake and diet play in hepatic encephalopathy. She found Mendoza knew to take lactulose but did not have "full understanding of the nutritional component" of his hepatic encephalopathy.

Melinek was asked about a hypothetical involving a man with a history of hepatic encephalopathy who used protein power as part of his nutritional intake. He "[g]oes into a bathroom under a delusion, operating on that delusion. [¶] That there is a woman in the bathroom who he starts yelling at, and the woman describes the man as speaking

gibberish to her and engaging in behavior that might be characterized as bizarre, such as peering through the door, yelling gibberish and crawling under the stall. Grabbing her, letting her go and appearing to reach for her, and then turning around and leaving. [¶] And this man then goes out to the street and just leans against the light pole and waits." Melinek said this behavior was "consistent with the confusion and delusions" caused by hepatic encephalopathy."

II.

Verdict, Sentencing and Appeal

The jury convicted Mendoza of felony false imprisonment. It did not reach a verdict on the misdemeanor peeking count, with four each voting to convict, to acquit and as undecided. The court declared a mistrial on the peeking count, granted the prosecution's motion to dismiss it in the interest of justice and denied a defense motion for a new trial.

The court suspended imposition of sentence and placed Mendoza on probation for five years. It stated, "[I]t is pretty clear that there is, to some degree, a mental health issue involved in this case that has a neurological influence. And because of that, Mr. Mendoza has not been given the opportunity to have treatment in that regard." Mendoza filed a timely notice of appeal.

DISCUSSION

I.

The Court Did Not Err in Excluding Mendoza's Statement to Officer Korte.

Mendoza first argues the trial court abused its discretion by excluding as inadmissible hearsay Officer Korte's testimony about a statement Mendoza made shortly after the incident that purportedly helped show he acted without criminal intent while under a delusion when he accosted Chloe. Mendoza offered Korte's testimony about his statement to show he entered the women's restroom and encountered Chloe in a delusional state caused by his hepatic encephalopathy and without the criminal intent

necessary to commit the crime of false imprisonment.[2] He contends that "the trial court's arbitrary and unreasonable exclusion" of this testimony denied him the opportunity to present "singular and pivotal evidence of his deluded state of mind at the very time of the incident," and that the court erred in ruling the testimony inadmissible because the prosecution could not "confront the auditory hallucination" by cross-examining him. He argues the exclusion of this evidence violated his federal constitutional rights to present a defense, to due process and to avoid self-incrimination.

We conclude the court did not err in applying California's Evidence Code, or correspondingly, violate Mendoza's constitutional rights, because Mendoza sought to introduce Korte's testimony to prove the truth of the out-of-court response he gave to Korte's question about what happened in the restroom, i.e., that he went to the restroom because he heard or believed someone told him, albeit a person who was a part of his delusion, that his sister was there. This event was the predicate for his defense that he acted under a delusion in his encounter with Chloe and thus could not have acted with the requisite criminal intent. Further, we conclude the court did not abuse its discretion in declining to admit the testimony under the then-existing-state-of-mind exception to the hearsay rule because of the untrustworthy nature of Mendoza's statement.

A. The Relevant Pre-Trial Proceedings

Before trial, the defense moved for the admission of Korte's testimony about Mendoza's statement. The court held a hearing under Evidence Code section 402 to hear, and determine the admissibility of, Korte's testimony.

At the hearing, Korte testified that he detained and spoke to Mendoza on a street corner a block from One Embarcadero Center for about six minutes until a "cold show" with Chloe was arranged. Korte said Mendoza "wanted to know what was going on,"

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[2] False imprisonment is defined as "the unlawful violation of the personal liberty of another." (§ 236.) It "requires only general criminal intent; that is, the defendant must intend to commit an act, the natural, probable and foreseeable consequence of which is the nonconsensual confinement of another person [citations]; or, to put it another way, false imprisonment requires only the 'wrongful intent' to commit the forbidden act." (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399.)

and that he, Korte, responded by "ask[ing] [Mendoza] what happened with the lady in the bathroom." According to Korte, Mendoza said "he was at the Embarcadero. He thought—he said somebody,—he didn't know—when I asked him numerous times who this somebody was, he said somebody told him his sister was in the restroom. He went in the restroom and asked the victim, 'Is that Liz?' 'Are you Liz?' Whatever. [¶] He said that she stated yes, and then he climbed underneath it, saw that it was a white skinny lady, woman. And that he then left." Korte further testified that he asked Mendoza what he was "waiting on" at the corner where Korte found him, and Mendoza said, 'I guess I'm waiting on the police.' "

In its brief, the defense argued that Korte's testimony was admissible under Evidence Code section 1250's then-existing-state-of-mind exception to the hearsay rule because it was being offered "to show what Mendoza thought he was doing which in turn explains his actions." It was trustworthy, the defense contended, because Mendoza made an inculpatory statement, i.e., that he went into the women's restroom, spoke before he was identified by Chloe or placed under arrest and lacked sufficient time to concoct a story. Also, because Korte's testimony was admissible, it could be discussed by the defense's expert witness without violating *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and its progeny.

At the hearing on the motion, defense counsel also argued that Korte's testimony did not contain hearsay at all because Mendoza was not offering his statement for the truth of what he said but, rather, to show he acted under the *delusion* that someone told him his sister was in the Embarcadero Center restroom. Counsel argued Korte's testimony was not hearsay and was admissible under Evidence Code section 356 and *Chambers v. Mississippi* (1973) 410 U.S. 284.

The prosecutor countered that Korte's testimony should be excluded because Mendoza's statements were untrustworthy hearsay. She contended that Mendoza, rather than being delusional at the time of the incident, made up a story to tell Korte, noting that Mendoza asked why Korte had approached him before saying anything and did not tell officers he was hearing voices or was confused, but instead said someone had told him

his sister was in the restroom. The prosecutor also argued the statement should not be admitted because the jury would not understand its context and would believe it was true because Korte and Melinek testified about it.

The court concluded the defense was offering Korte's testimony for its truth. Although the defense was not seeking to admit for its truth the *third-party* statement by "somebody" that Mendoza's sister was in the restroom, i.e., to prove Mendoza's sister was in the restroom, the defense nonetheless was putting Mendoza's credibility at issue. This was so, the court said, because the import of Mendoza's statement to Korte that "somebody" told him about his sister's whereabouts was predicated on whether he accurately heard the third-party statement, believed it to be true and acted in conformity with that belief. However, Mendoza's credibility could not be tested because he did not plan to testify. The court contrasted these circumstances with those discussed in *People v. Hill* (1992) 3 Cal.4th 959 (*Hill*),[3] where a *testifying* defendant's account of a declarant's out-of-court statement, offered to show the defendant's state of mind when the statement was made, was held admissible as nonhearsay.

The court also declined to admit Korte's testimony under Evidence Code section 1250's then-existing-state-of-mind exception to the hearsay rule. The court found under Evidence Code section 1252 that Mendoza's statement lacked trustworthiness.

The court further ruled that *Sanchez* prohibited the defense expert from testifying about Mendoza's out-of-court statement. However, the expert could rely on it in forming an opinion and state in general terms that she had done so.

B. Legal Standards

The Evidence Code prohibits, except as provided by law, the admission of hearsay, which is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subds. (a), (b).) " 'The first and most basic requirement for applying the not-for-truth limitation . . . is that the out-of-court statement must be offered for some

[3] *Hill* was overruled in part on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.

purpose independent of the truth of the matter it asserts. That means that the statement must be capable of serving its nonhearsay purpose regardless of the whether the jury believes the matters asserted to be true.' " (Simons, Cal. Evidence Manual (2019) Hearsay Evidence ¶ 2:5, p. 84, quoting *People v. Hopson* (2017) 3 Cal.5th 424, 432.) As Justice Simons points out, when the proponent of evidence contends the statement is offered for a reason other than its truth, the court should carefully examine whether (1) there is a theory of admissibility unrelated to the truth of the matter and (2) that nonhearsay purpose is relevant. (Simons, at p. 84.)

If a statement is determined to be hearsay, the court must consider whether any exception to the hearsay rule urged by the proponent of the evidence applies. In the court below, the defense invoked the then-existing-state-of-mind exception to the hearsay rule. That exception is set forth in Evidence Code section 1250, which provides in relevant part, "[s]ubject to [Evidence Code] section 1252, evidence of a statement of the declarant's then existing state of mind . . . (including a statement of intent, plan, motive, design, . . .) is not made inadmissible by the hearsay rule" when the evidence is offered either "to prove the declarant's state of mind . . . at that time or at any other time when it is itself an issue in the action" or "to prove or explain acts or conduct of the declarant." Evidence Code section 1252 provides that a statement is inadmissible "if the statement was made under circumstances such as to indicate its lack of trustworthiness."

Under Evidence Code section 1252, " '[t]he decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.' " (*People v. Edwards* (1991) 54 Cal.3d 787, 819–820.) "To be admissible under Evidence Code section 1252, statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are ' "made at a time when there was no motive to deceive." ' " (*Id.* at p. 820, followed in *People v. Ervine* (2009) 47 Cal.4th 745, 778–779.) A reviewing court may overturn the trial court's

finding about trustworthiness only if there is an abuse of discretion. (*Edwards*, at p. 820.)

A defendant has a fundamental right to present witnesses in his or her own defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408 (*Taylor*), citing *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.) However, a defendant "does not have an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence." (*Taylor*, at p. 410; *People v. Blacksher* (2011) 52 Cal.4th 769, 821 [" 'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense' "]; but see *People v. Cunningham* (2001) 25 Cal.4th 926, 999 ["Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense"].)

Mendoza argues we should apply a de novo standard of review to his constitutional claims, while the People argue we should apply an abuse of discretion standard to all of his challenges. Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) However, we apply the de novo standard of review to the extent Mendoza's arguments raise questions of evidentiary and constitutional law. (See *People v. Duarte* (2000) 24 Cal.4th 603, 618 [de novo review of a hearsay issue presenting a question of "state evidentiary law"]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 225, fn. 7 ["Because the present case . . . implicates defendant's federal constitutional rights of due process and concerns the fundamental fairness of his trial, we will apply the *de novo* standard of review"].)

C. The Proffered Testimony Was Hearsay.

Mendoza argues Korte's testimony does not contain hearsay under Evidence Code section 1200 because his statement to Korte was not offered "to prove the truth of the matter stated," i.e., to prove that his sister was in the Embarcadero Center restroom, but merely to show his state of mind and explain his actions. While his argument is accurate to a point, Mendoza fails to grapple with the whole of the statement.

While Mendoza did not offer his out-of-court statement to Korte to prove his sister was in the restroom, the third-party statement about her whereabouts was only a part of what Mendoza related to Korte and sought to have admitted at trial. Mendoza also said "*somebody told him*" about his sister's whereabouts. (Italics added.) His counsel's arguments to the court indicate the defense *was* offering this statement for its truth. In other words, that somebody told Mendoza, albeit a person who was a part of his delusion, that his sister was in the restroom and that he believed this statement could be true was the necessary factual predicate for his defense that he lacked any criminal intent when he entered the women's restroom and accosted Chloe. It is true, as Mendoza further argues, that he offered his statement to Korte for the purpose of showing his delusional state of mind and explaining his conduct in going into the restroom. But that does not mean the statement did not include hearsay. The efficacy of his state-of-mind defense depended on the *truth* of an event having occurred, i.e., that he perceived "somebody" telling him his sister was in the restroom.

Mendoza does not discuss at any length the remainder of his out-of-court statement to Korte. As we have discussed, he also recounted to Korte that upon hearing someone tell him his sister was in the restroom, he went in there looking for her, asked the victim if her name was Liz, to which she responded affirmatively, climbed under the stall and saw it was not his sister and then left. It is apparent that Mendoza offered this part of his statement to Korte for its truth as well, since it otherwise has no relevance to his delusion defense.

In short, since Korte's testimony about Mendoza's statement was offered for its truth, the court properly concluded it was hearsay regardless of the fact that it was offered to show Mendoza was in a delusional state of mind.

Mendoza also argues that, contrary to the trial court's analysis, *Hill* supports the admission of his statement to Korte as a nonhearsay, non-assertive extrajudicial statement by an out-of-court declarant offered solely to explain a defendant's state of mind and conduct. We disagree. Hill was tried and convicted of robbing a jewelry store and murdering the operator, Brice, and his young son. (*Hill*, *supra*, 3 Cal.4th at p. 971.) The

prosecution's theory of the case was that defendant robbed and killed the Brices because he was under pressure to repay a debt to a drug dealer named Michael McCray. (*Id.* at p. 973.) The defense theory was that *McCray* had killed the Brices and was attempting to exculpate himself by incriminating Hill. (*Id*. at pp. 977, 986.) Hill, who testified on his own behalf, claimed that shortly after he fled the jewelry store he saw McCray driving and McCray stopped his car and spoke with Hill. The prosecutor objected on hearsay grounds to defense counsel's effort to elicit from Hill what McCray had said. (*Id*. at p. 987.) The defense offered to prove that McCray handed a bag of jewelry to Hill and told him, " 'Here's the jewelry. Would you sell it?' or something like 'Would you sell the jewelry? I want you to sell it.' " The trial court sustained the objection. (*Ibid*.)

In the Supreme Court, Hill contended he was offering McCray's statement not for the truth but as "nonassertive background material that explained [his] state of mind and conduct." (*Hill*, *supra*, 3 Cal.4th at p. 987.) The People conceded this evidence would have been relevant to show Hill's state of mind but contended his state of mind was "not a material issue." (*Ibid*.) The Supreme Court disagreed, observing, "To undercut defendant's contention that McCray killed the Brices, the prosecutor introduced evidence that several witnesses had observed defendant with a large quantity of jewelry like that taken from Brice's store. Defendant attempted to rebut this damaging evidence by showing that he had taken the jewelry *from McCray* because defendant knew McCray was the killer and feared that McCray would kill him if he did not follow McCray's commands." (*Ibid*.) "If the jury believed [Hill's] assertion that he took the jewelry from McCray because [he] feared for his own safety, the jury could have reasonably rejected the prosecution's implication that [he] had taken the jewelry from the store, which implication pointed to [him] as the killer. The reason defendant had some of the jewelry from Brice's store was therefore an intermediate fact of consequence." (*Ibid*.)[4]

[4] The appellate court concluded this error was harmless because Hill testified that he received the jewelry from McCray and could testify as to why he was afraid of McCray or attempted to sell the stolen jewelry. (*Hill*, *supra*, 3 Cal.4th at p. 988.)

Hill is similar to this case in some respects. Both cases involve accounts by a defendant about out-of-court statements by a third party, McCray in *Hill* and "somebody" in the present case. In neither case was the third-party statement hearsay, albeit for different reasons: McCray's alleged request or demand that Hill sell the jewelry was not offered for its truth and in any event was largely directive rather than declarative, and here, the statement Mendoza said was told to him—that his sister was in the bathroom—also was not offered to prove that his sister was in fact in the bathroom. Also, in both *Hill* and this case aspects of the defendants' accounts other than what they said about the third-party statements were offered in part for their truth. Hill testified about what transpired between him and McCray after the robbery and killings, and the truth of what he said happened was key to his defense that McCray was the robber and the killer, not him. Mendoza told Korte that someone said his sister was in the restroom, and the truth of this event was key to his defense that he acted under a delusion and without criminal intent.

These similarities are noteworthy but in the end are not dispositive in light of a key difference between *Hill* and this case. That difference is that Hill's testimony at trial about what transpired between him and McCray after the robbery and killings was not an out-of-court statement. It was testimony Hill gave under oath in court, where he was subject to cross-examination. The only part of his testimony that was the subject of a hearsay challenge was about what McCray said to him (which, as we have said, was not offered for its truth). Here, by contrast, Mendoza did not state that someone told him his sister was in the restroom while testifying in court, where he would have been subject to cross-examination. Rather, the statement he sought to admit was one he made out of court to a police officer who approached him on the street. He sought to have the officer testify to that statement; he did not testify on his own behalf. In short, unlike Hill's in-court testimony about how and why he had come in possession of the jewelry, Mendoza's out-of-court statement about how and why he entered the women's restroom fell squarely within the definition of hearsay. (Evid. Code, § 1200.)

Nor does it matter that Mendoza's ultimate purpose for his out-of-court statement to Korte was to prove his state of mind, i.e., his lack of criminal intent, when he entered the restroom and Chloe's stall. This is because his claimed state of mind was predicated on the truth of his assertion that "somebody" told him his sister was there. The fact that a statement is offered for the ultimate purpose of showing a party's state of mind does not preclude it from being hearsay. It may, based on that ultimate purpose, fall within an *exception* to the hearsay rule that makes it admissible, but that does not mean a statement offered for that purpose is not hearsay in the first instance. The relevant questions are whether the statement is one made out of court and whether it is offered for the truth of the matter stated.

The *Hill* court reached a similar conclusion regarding other testimony proffered by Hill, who also sought to testify that McCray's sister-in-law, Daniels, came to his home soon after the jewelry store incident and " 'asked me if I had sold the stuff [the jewelry].' " (*Hill*, *supra*, 3 Cal.4th at p. 989.) Hill argued Daniels' out-of-court communication was admissible to explain why he gave Daniels some of the jewelry he received from McCray. (*Id.* at pp. 988–989.) The *Hill* court noted that Hill went on to testify that he gave Daniels about half the jewelry he had obtained from McCray to show the jewelry belonged to McCray, the actual robber and killer. The court concluded, "[t]he purpose of the alleged inquiry by Daniels [to Hill] was therefore to prove the truth of the implied assertion that the jewelry belonged to McCray rather than to [Hill]. . . ," rendering it inadmissible hearsay. (*Id*. at pp. 989–990.)[5]

In short, the defense offered Mendoza's out-of-court statement to Korte that

[5] The *Hill* court's analysis is consistent with case law cited by the People regarding the inadmissibility of "implied hearsay." (See *People v. Pic'l* (1981) 114 Cal.App.3d 824, 885 ["[a] declarant's express words that are offered to prove the *truth* of an *implied* statement to be inferred from such express words constitute a hearsay statement" that is as inadmissible as an express hearsay statement], disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 496, fn. 12.) In light of our conclusion that Mendoza's statement to Korte on its face was offered for a hearsay purpose, we have no need to address the parties' discussion of implied hearsay.

"somebody told him his sister was in the restroom" to prove that he went to the restroom because "somebody" told him, albeit a person who was a part of his delusion, that his sister was there. It is also apparent that he offered the remainder of his statement for its truth as well—to prove what occurred in the restroom. Since the testimony was offered for the truth of Mendoza's out-of-court statement, it was hearsay regardless of the ultimate purpose for which it was proffered. Because Mendoza's statement was offered for the truth, it was hearsay notwithstanding that the defense's ultimate purpose for introducing it was to establish Mendoza's exculpatory state of mind. Therefore, the trial court did not err in concluding this statement was hearsay.

D. The Trial Court Did Not Abuse Its Discretion in Applying the State-of-Mind Exception.

Mendoza argues that, even if Korte's testimony about his statement was hearsay, the court nonetheless should have admitted it under the then-existing-state-of-mind exception to the hearsay rule contained in Evidence Code section 1250. We conclude the trial court did not abuse its discretion under Evidence Code section 1252 in ruling that this hearsay was too untrustworthy to admit. (See *People v. Buell* (2017) 16 Cal.App.5th 682, 689 ["The determination whether hearsay evidence is trustworthy rests with the trial court and will not be disturbed on appeal absent an abuse of discretion"].)

In finding that Korte's testimony about Mendoza's statement was too untrustworthy to admit, the trial court said, "[I]t can be readily inferred that here when [Mendoza] was contacted by [Korte] that there was sufficient time for [Mendoza]—and I may add, he had a compelling motive to exonerate himself from and/or at least minimize his responsibility for entering into a women's bathroom and gaining access into that closed stall while a woman occupied that stall." Among the evidence of suspicious circumstances, the court indicated, were that Mendoza told Korte he was on the street corner waiting for the police; Mendoza knew Chloe had seen him and that he had told her not to call the police; and (as indicated by a video that was to be presented at trial that is not included in the record), Mendoza went in and out of the restroom wearing gloves but no longer had them by the time Korte contacted him, suggesting he disposed of them.

Each of these circumstances tends to show Mendoza was aware he had acted wrongfully at the time he spoke to Korte and thus, as the trial court stated, "had a compelling motive to exonerate himself."

Mendoza argues the court's conclusion was "unreasonable and arbitrary." Along with repeating his argument that Korte's testimony of his statement was not offered for the truth of the matter, he contends that the trial court "ignored [Evidence Code section] 1230's statutory determination of reliability because far from 'exonerat[ing]' [Mendoza], the statement was directly against [Mendoza's] penal interest.[6] We are not persuaded. Putting aside that Mendoza does not establish that he specifically raised the section 1230 exception below, its application also is subject to the trial court's discretionary evaluation of the proffered statement's trustworthiness. (*People v. Geier* (2007) 41 Cal.4th 555, 583, 585.) "[T]he court may take into account not just the words but the circumstances under which they were uttered [and] the possible motivation of the declarant . . . ." (*Id.* at p. 584.) Mendoza in effect argues that, although he reasonably could have been aware of evidence that he had confronted Chloe in the restroom and although he had time to invent a story to explain his confronting Chloe, he nonetheless made a statement against his penal interest that was so compelling that it had to be considered reliable. In effect, he is asking us to reweigh the evidence and substitute our judgment for that of the trial court. This we cannot do. (See, e.g., *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1250 [in evaluating a matter under an abuse of discretion standard, " '[w]e do not reweigh the evidence or substitute our notions of fairness for the trial court's' "].) In short, the evidence concerning trustworthiness was at least conflicting. The trial court did not abuse its discretion in finding Mendoza's statement to Korte insufficiently trustworthy to admit under Evidence Code section 1252.

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[6] Evidence Code section 1230 contains an exception to the hearsay rule for statements that when made "so far subjected [the out-of-court declarant] to the risk of . . . criminal liability . . . that a reasonable [person] in his position would not have made the statement unless he believed it to be true."

Given the propriety of the court's ruling that the evidence was inadmissible hearsay, Dr. Melinek could not testify about it under *Sanchez*, as the trial court also ruled. Mendoza does not contend that his proffered hearsay contained anything other than case-specific facts. In *Sanchez*, our Supreme Court held that an expert "cannot . . . relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) The court did not err in barring Melinek from describing this hearsay, although, as the court also correctly pointed out, the expert "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that [she] did so." (*Id.* at p. 685**.)**

E. Exclusion of the Korte Testimony Did Not Violate Defendant's Constitutional Rights.

Mendoza also argues the court's exclusion of the Korte testimony about his out-of-court statement violated his constitutional rights in two ways.

First, Mendoza argues the exclusion violated his right to present witnesses in his own defense. He acknowledges that there are limits on that right but argues that here the excluded statement was "relevant, highly probative, and critical nonhearsay evidence" that the trial court "arbitrar[ily] and unreasonabl[y]" excluded. We have already rejected his arguments that the statement was nonhearsay and that the trial court acted arbitrarily or unreasonably (i.e., abused its discretion); this generally is a sufficient ground to reject his constitutional argument. (See *Taylor*, *supra*, 484 U.S. at pp. 410–411; *People v. Blacksher*, *supra*, 52 Cal.4th at p. 821.) Further, we are not persuaded that the exclusion had the effect of preventing defendant from presenting a viable defense. The People contend that, even if the statement tended to show Mendoza was suffering from a delusion (which the People contend was not credible in light of his demeanor and lucidity in talking with Korte), "it did not show that he lacked the general criminal intent required to convict him of false imprisonment. . . . He did not claim to have believed the stall was empty; rather, he claimed to have believed it was occupied by his sister, Liz. But even were that true, all it would mean is that by his words and actions he had falsely

imprisoned his sister—the identity of the victim does not affect his having had general criminal intent."

We agree with the People. Felony false imprisonment is a general intent crime that requires only that the defendant "intend to commit an act, the natural, probable and foreseeable consequence of which is the nonconsensual confinement of another person." (*People v. Olivencia*, *supra*, 204 Cal.App.3d at pp. 1399–1400; see *People v. Saez* (2015) 237 Cal.App.4th 1177, 1194, fn. 14.) In order for the jury to convict Mendoza of felony false imprisonment, it was instructed to find, and necessarily had to find, he intentionally restrained or confined Chloe by violence or menace and made her stay or go somewhere against her will. The evidence that he had intended to confine her against her will was Chloe's testimony that after she screamed at him and threatened to call the police, Mendoza told her not to call them, crawled under the barrier and into her stall, stood in front of her with his back to the door, grabbed her and pulled her down to the floor, lunged at her with his arm and did not leave the stall until someone else entered the restroom. Even if he had been allowed to submit evidence suggesting that he labored under the delusion that his sister was in the restroom it would not have negated this evidence of his intent to commit the acts that constituted false imprisonment. He did not tell Korte that he did not do the restraining acts that Chloe described or otherwise contradict the details of her account that underlay his conviction for false imprisonment. He told Korte only that he climbed under the stall and, on realizing the woman there was not his sister, left. In short, Mendoza's out-of-court statement would not have provided a viable defense to the general intent crime of false imprisonment.

Mendoza also contends the trial court "conditioned admission of his out-of-court statement on his willingness to waive his right against self-incrimination" and thereby violated his Fifth Amendment and due process rights. He refers to the trial court's discussion of the fact that Mendoza did not plan to testify and its distinction of the *Hill* case. The People disagree, pointing out that the trial court's comments were made in the context of discussing the hearsay nature of defendant's statements and the distinction between this case and *Hill*.

We have reviewed the trial court's comments and agree with the People. The court noted Mendoza was not planning to testify in the context of discussing that his out-of-court statement was being offered for the truth of a part of what defendant said, and as such was hearsay that could not be tested by cross-examination. Further, the court was observing that the *Hill* case was unlike this one in that the defendant there testified and the in-court testimony he gave about McCray stopping and speaking with him, unlike Mendoza's out-of-court statement about someone speaking to him, was not hearsay. Contrary to Mendoza's argument, the trial court's hearsay analysis did not amount to conditioning the admission of his out-of-court statements on his willingness to forgo his privilege against incrimination.[7]

II.

Mendoza's Claims of Instructional and Evidentiary Error Also Fail.

Mendoza next makes the somewhat convoluted argument that the trial court erred by denying his request for jury instructions on the false imprisonment count about accident and mistake of fact because these defenses were supported by the substantial evidence of his delusional state presented by his expert witness, Dr. Melinek, whose testimony the court erroneously excluded with regard to the false imprisonment count. We conclude Mendoza has forfeited his appellate claim regarding Melinek's testimony and that without it—or with it—there is no substantial evidence to support the requested instructions.

A. The Court's Exclusion of Melinek's Testimony

1. *The Relevant Proceedings*

Mendoza does not show his trial counsel opposed the trial court's decision to exclude Melinek's testimony regarding the false imprisonment count, nor does he indicate on what basis his counsel might have opposed it. The People refer us to a pre-

[7] In light of our conclusions that the court properly treated Korte's proffered testimony as hearsay and did not abuse its discretion in excluding it as untrustworthy, we do not address the parties' debate about whether any constitutional or state law error by the trial court in excluding it was prejudicial to Mendoza's case.

trial discussion, held after the court had heard a proffer of Melinek's testimony, in which the court told counsel that it was admitting Dr. Melinek's testimony for the peeking count only and invited counsel "to place anything on the record that they wish to place at this time in that regard." Defense counsel responded that "the presence of a specific intent element in Count 2 [the peeking count] specifically calls into question whether the defense is going to present a mens rea defense with respect to that specific intent element, and as the Court can see, we are." The court responded that it was only indicating that Melinek's testimony did apply to count two, and that it did not apply to count one, the false imprisonment count. Defense counsel replied that she was "clear on that part . . . of the Court's ruling." The People also point out that when the court told the jury of the limited application of Melinek's testimony during trial and in its final jury instructions, defense counsel did not object.

2. *Analysis*

As these proceedings indicate, the court limited the jury's consideration of Dr. Melinek's testimony to the peeking charge only. Mendoza has forfeited any challenge to this ruling for two reasons.

When invited to do so, Mendoza's trial counsel did not challenge the trial court's ruling limiting the application of Melinek's testimony to the peeking count, but instead accepted it. This forfeits Mendoza's appellate claim that the court erred in limiting the application of that testimony. (See *People v. Hughes* (2002) 27 Cal.4th 287, 393, 397 [defendant forfeited any claim the trial court erred by limiting the evidence an expert could testify to because his trial counsel "expressly acceded to the trial court's limitation"]; *People v. Partida* (2005) 37 Cal.4th 428, 431 [a trial objection to a ruling excluding certain evidence must fairly state the specific reason or reasons for the objection and any claim of error based on another reason is forfeited]; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate court barred from reaching an issue about the admission or exclusion of evidence that has not been preserved for review by a party].)

Mendoza contends that he has not forfeited his appellate claim regarding Melinek's testimony for several reasons. First, he asserts "the proper scope of Dr.

Melinek's testimony [was] in dispute throughout the proceedings below." This is unpersuasive because Mendoza does not identify anything in the record showing this was in fact the case regarding the false imprisonment count.

Second, Mendoza argues based on section 1259[8] and related case law that we may review any instructional error even if no objection was made because it affects his substantial rights. This is comparing apples to oranges. Mendoza does not raise a "question of law" as required by section 1259; rather, he seeks to challenge an instruction to the jury limiting its consideration of certain evidence. This instruction followed the court's ruling partially excluding evidence and, as we have discussed, Mendoza was required to oppose that ruling to preserve his appellate claim.

Third, Mendoza contends his counsel's acceding to the court's exclusion of Melinek's testimony from the evidence admitted regarding the false imprisonment count was, rather than being a concession, merely an acknowledgment of the court's previous ruling the day before that Melinek "not opine to the jury that Mr. Mendoza . . . did or did not act either in conformity or conduct himself in a manner which would indicate that he was suffering from that diagnosed condition . . . [¶] . . . [¶] [because] that's the ultimate question to be decided by the trier of fact. . . . [¶] . . . [¶] [Melinek] can't say that Mr. Mendoza to a medical certainty did exhibit those symptoms on that date and time." That ruling was of a general nature, and unrelated to the court's ruling the next day that Melinek's testimony would not be admitted regarding the false imprisonment count.

Furthermore, Mendoza has waived his appellate claim that the trial court erred in excluding Melinek's testimony regarding false imprisonment. His entire argument consists of his contention that Melinek gave "highly credible testimony." We need not

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[8] Section 1259 states, "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

and do not further consider this appellate claim because of the inadequacy of this argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [court may treat as waived and pass without consideration arguments and assertions unsupported by legal authority and specific argument].)

In short, Mendoza has forfeited his claim that the court trial erred in excluding Melinek's testimony regarding the false imprisonment count.

B. The Court's Rejection of Mendoza's Proposed Instructions on Mistake of Fact and Accident

Mendoza's claim of instructional error is based on his contention that Dr. Melinek's testimony provided substantial evidence to support his requested instructions on the defenses of accident and mistake of fact as modified from CALCRIM Nos. 3404 and 3406.[9] As we have just discussed, we affirm the court's exclusion of this evidence regarding the false imprisonment count. Accordingly, Mendoza does not show there was any evidentiary basis for these instructions. In any event Melinek's testimony was too speculative to support giving them. Therefore, we reject Mendoza's instructional error claim.

1. *The Relevant Proceedings*

The court held a hearing on jury instructions after the evidence was presented. Following a period off the record, the court announced it and counsel were going to memorialize that the defense had requested jury instructions on CALCRIM Nos. 3404 and 3406, and that the court had denied this request for lack of evidence. Defense counsel then stated that it requested the following based on the accident instruction, CALCRIM No. 3404: "The defendant is not guilty of false imprisonment or peeking if he acted without the intent required for that crime but acted instead accidentally. [¶] You

[9] These defenses have as their source section 26, which states that persons are excepted from those capable of committing crimes if they commit the act or make the omission charged as a crime "under an ignorance or mistake of fact, which disproves any criminal intent," or "by accident, when it appears that there was no evil design, intention, or culpable negligence." (§ 26, Three and Five.)

may not find the defendant guilty of felony false imprisonment or peeking unless you are convinced beyond a reasonable doubt that he acted with the required intent."[10] (Italics omitted.) Counsel stated in support of this instruction: "So the testimony before the jury is that there was delusional behavior, and that would be appropriate to argue accident given the testimony of the expert, Dr. Judy Melinek."

Defense counsel then stated, "As to Cal Crim 3406, I requested mistake of fact instruction as to Count 2, peeking, because the bench notes, the authority and the use instructions to Cal Crim 3406 authorize use of this instruction when there is a specific intent and the defendant acted essentially in an involuntary state under a mistaken fact." Counsel then stated in support of this instruction: "So the testimony before the jury is there was delusional conduct. [Mendoza] operated under a mistaken belief, [a] mistaken fact. It wasn't rational. However, it was reasonable given his delusional state. And had the mistake of fact been true, i.e., his sister was in the restroom, he would not have committed any crime. Particularly the crime of peeking or violating . . . privacy.

"So because there isn't voluntary intoxication here, the mistake of fact defense is not precluded. The delusional state that he was in is akin to a delusional state based on involuntary intoxication because he has no control over when this happens to him."

After the court stated there was insufficient evidence to support these instructions, defense counsel added, "And that is a denial of his federal due process rights to have a jury hear and consider all of the relevant evidence to determine whether or not he acted with specific intent."

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[10] Although the trial court rejected this proposed instruction, it did instruct the jury that false imprisonment was a general intent crime for which "the person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he intentionally does a prohibited act . . . ." It instructed further that to prove false imprisonment, the prosecution had to show that "[t]he defendant intentionally restrained or confined someone by violence or menace" and "made the other person stay or go against that person's will."

2. *Analysis*

Without Melinek's testimony, Mendoza certainly cannot maintain his claim that the court erred in denying him instructions on accident and mistake of fact. There was not any evidence presented at trial that he acted other than intentionally to falsely imprison Chloe, as indicated by her own compelling testimony of his actions in the restroom.

Even if the court had admitted Melinek's expert testimony regarding the false imprisonment count, we would still conclude it was insufficient to support instructions on accident and mistake of fact. Mendoza argues Melinek's testimony provided substantial evidence for these instructions because it showed he was "involuntarily intoxicated" on the day of the incident, i.e., he unknowingly and through no fault of his own digested so much protein powder as to cause him to become delusional. Mendoza rests this theory on *People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 (involuntary intoxication resulting from unknowingly drinking hallucinogen-containing punch negated criminal intent to unlawfully take a vehicle under mistake of fact law) and *People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1083–1084 ("A defendant who commits criminal acts while under a temporary delusion caused by involuntary intoxication is neither morally blameworthy nor a menace to the community and therefore may appropriately use the mistake-of-fact defense to obtain complete exoneration"].)

The People argue that *Scott* and *Gutierrez* do not apply here because, even if Mendoza did have a genuine delusion resulting from his hepatic encephalopathy on the day of the incident, the delusion "was far more akin to mental illness than involuntary intoxication" since, unlike involuntary intoxication, it resulted from "a permanent condition rather than a singular and unique act." They note that false imprisonment is a general intent crime (*People v. Fernandez* (1994) 26 Cal.App.4th 710, 716)[11] and that, as

[11] "A general criminal intent crime exists when the statutory definition of the crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence. A specific intent crime exists when the statutory definition refers to the defendant's intent to do some further act or achieve some

one court has put it, "[a]t least insofar as general intent crimes are concerned, it is settled that a mistake-of-fact defense, pursuant to section 26, subdivision Three, cannot be predicated upon delusions which are the result of mental illness." (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1454; see § 25 [abolishing the defense of diminished capacity].)[12]

We do not need to resolve the parties' debate about whether any hepatic encephalopathy-related delusion Mendoza might have suffered from an over-intake of protein is more akin to involuntary intoxication or mental illness. The only evidence that Mendoza suffered from such a delusion at the time of the incident—Melinek's testimony—is far too speculative to require the court to instruct on accident and mistake of fact regarding the false imprisonment count. Melinek testified only that Mendoza suffered from "a very mild form" of chronic hepatic encephalopathy. She opined that an increased ammonia level in the body's bloodstream could penetrate the brain and could cause delusions, but she did not identify the level required for this to occur. Furthermore, there was no evidence that Mendoza had an elevated ammonia level on the day of the incident.

Also, Melinek indicated that, if Mendoza did have an elevated ammonia level that day, many factors could have caused it. Along with eating meat and protein powders, Melinek identified dehydration, constipation, gastrointestinal bleeding, infection and the use of alcohol and depressant medications as factors that can increase the level of ammonia in the bloodstream. There was no evidence which of these factors, if any, affected Mendoza on the day of the incident. The packets of protein powder in his

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additional consequence." (*People v. Swanson* (1983) 142 Cal.App.3d 104, 109, citing *People v. McDaniel* (1979) 24 Cal.3d 661, 669.)

[12] Mendoza also points out in support of his argument that the court erred in failing to instruct on accident and mistake of fact that the court itself at sentencing referred to his "mental health" issue in placing him on probation. However, this ignores that section 25 also provides that "evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment." (§ 25, subd. (c).)

possession at the time of his arrest were the only evidence that he might have ingested protein that day. But his possession of them does almost nothing to establish that he consumed so much protein powder that day that ammonia entered his brain and caused him to experience a delusion. And while Mendoza argues that his over-intake of protein was not his fault because it was due to his receiving incorrect medical advice, Melinek only testified that Mendoza was told on *one* occasion in 2016 to go out and eat *one* protein-rich meal, not that he was told to regularly adhere to a protein-rich diet. For all of these reasons, even if we were to consider Melinek's testimony, it would be too speculative to support the instructions Mendoza requested regarding false imprisonment.

Therefore, we reject Mendoza's claims of evidentiary and instructional error. In light of our conclusions, we have no need to address the remainder of Mendoza's arguments, including that the court's evidentiary and instructional errors were prejudicial, that we should consider statements by jurors to the court prior to sentencing expressing their discomfort with the verdict, and that the court, by its instructional errors, committed structural error by improperly directing a verdict as to the element of general intent on the false imprisonment count.

DISPOSITION

The judgment is affirmed.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.